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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/037,941	01/03/2002	Carolyn Jean Cupp	112701-330	7917
29157	7590	08/24/2006		
BELL, BOYD & LLOYD LLC P. O. BOX 1135 CHICAGO, IL 60690-1135				
			EXAMINER HENDRICKS, KEITH D	
			ART UNIT 1761	PAPER NUMBER
DATE MAILED: 08/24/2006				

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Advisory Action Before the Filing of an Appeal Brief</b>	<b>Application No.</b> 10/037,941	<b>Applicant(s)</b> CUPP ET AL.	
	<b>Examiner</b> Keith Hendricks	<b>Art Unit</b> 1761	

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 04 August 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
 (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
 (b) ☐ They raise the issue of new matter (see NOTE below);  
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
 5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
 6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
 7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
 The status of the claim(s) is (or will be) as follows:  
 Claim(s) allowed: \_\_\_\_\_.  
 Claim(s) objected to: \_\_\_\_\_.  
 Claim(s) rejected: \_\_\_\_\_.  
 Claim(s) withdrawn from consideration: \_\_\_\_\_.

#### AFFIDAVIT OR OTHER EVIDENCE

8. ☒ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: see attached sheet.  
 12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). \_\_\_\_\_.  
 13. ☐ Other: \_\_\_\_\_.

10/037,941

## Attachment to Advisory Action

## 102 rejection:

Applicant's arguments have been considered, but are not deemed persuasive over those already presented, which claims were and are rejected over the prior art for the reasons of record.

The submission of a second affidavit, directed to the same issue that has repeatedly been on the record, is not considered timely, and will not be entered or considered at this point in prosecution. Applicant has had ample time and opportunity to address these issues, including in previous (RCE) filings. Further, it is noted that such information would not be proper as part of an appeal brief without prior consideration.

## 103 rejection:

Applicant's arguments submitted in the response of August 04, 2006, have been considered. The arguments are not deemed persuasive over those already presented, which claims were and are rejected over the prior art for the reasons of record.


At the top of page 5 of the response, applicant states that "The Patent Office is essentially arguing that the skilled artisan would take a striated pet food and make it unstriated." This is an absolutely incorrect and misleading representation of the rejection, which has been clearly set forth by the Office actions on the record. This interpretation of the rejection is wholly inaccurate, and does not serve to further prosecution, reduce the issues at hand, nor does it serve to actually address the issues as set forth in the previous Office actions.

In response to applicant's argument that the teachings of Hand et al. would "destroy" the invention of Collings et al., the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

Contrary to applicant's statements, the Office is in no way suggesting that "the skilled artisan would take a striated pet food and make it unstriated," as applicant incorrectly purports. Rather, the rejection set forth in the first Office action of July 2003 (see specifically pages 4-5) stated that the product of Collings et al. differed from the claimed invention in size dimensions only, and that one of ordinary skill in the art would have been able to readily select a pet food product of similar size. As stated therein, "it would not have involved an inventive step for one of ordinary skill in the art to have cut and produced the final pet food in slightly larger dimensions, as shown by the similar and related products of Hand et al. There does not appear to be a patentable distinction between the slightly larger dimensions as a matter of 2-4 mm of the pet food product." Thus Hand et al. was included as a general reference showing that pet food products were known to be produced within the size ranges instantly claimed. Therefore applicant's statement that the "Office is essentially arguing that the skilled artisan would take a striated pet food and make it unstriated" is completely unfounded. Further and again, this does not address the actual issues and motivation set forth of record.

Finally, applicant is again referred to MPEP 2144.04 (IV) (a), regarding nominal changes in size and shape of a known product.

Applicant has not successfully met the burden of accurately addressing and overcoming the rejections of record, and thus the rejections stand.



**KEITH HENDRICKS**  
**PRIMARY EXAMINER**